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LAW, MEDICINE, AND RELIGION: TOWARDS A DIALOGUE AND A PARTNERSHIP IN BIOMEDICAL TECHNOLOGY AND DECISION MAKING

*George P. Smith, II**

Law and ethical standards are not subjects of research and discovery; they are the fruits of slow evolutionary processes. The law does not search out as do science and medicine; it reacts to social needs and demands. Law is not an end in itself—it is a tool, a means.

Warren E. Burger¹

The truths contained in religious doctrines are after all so distorted and systematically disguised that the mass of humanity cannot recognize them as truth.

Sigmund Freud²

Religions, philosophies, arts, the social forms of primitive and historic man, prime discoveries in science and technology, the very dreams that blister sleep, boil up from the basic, magic ring of myth . . . symbols of mythology are not manufactured; they cannot be ordered, invented, or permanently suppressed. They are

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1. Warren E. Burger, *Reflections on Law and Experimental Medicine*, in 1 *ETHICAL, LEGAL AND SOCIAL CHALLENGES TO A BRAVE NEW WORLD* 211 (George P. Smith, II, ed., 1982).

2. SIGMUND FREUD, *THE FUTURE OF AN ILLUSION* 44 (James Strachey et al. trans, standard ed. XXI; The Hogarth Press 1961) (1927).

spontaneous productions of the psyche, and each bears within it, undamaged, the germ power of its source.

Joseph Campbell³

INTRODUCTION AND OVERVIEW

Faith, religion, spirituality, and prayer have a current focused outreach and easy parlance in the market places and public squares of the nation.⁴ News stories⁵ and court cases abound with dramatic challenges to the placement of monuments to the Ten Commandments in public buildings and grounds,⁶ the use of God's name in school pledges of allegiance,⁷ the teaching of Darwinian or evolutionary science in public education,⁸ the

3. JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* 3, 4 (1949).

4. See generally Hugh Heclo, *An Introduction to Religion*, in *RELIGION RETURNS TO THE PUBLIC SQUARE: FAITH AND POLICY IN AMERICA* 3 (Hugh Heclo & Wilfred M. McClay eds., 2003); *Symposium on Religion in the Public Square*, 17 NOTRE DAME J. L. ETHICS & PUB. POL'Y 307 (2003).

5. Larry Copeland, *Church-and-State Standoffs Spread over USA*, USA TODAY, Sept. 30, 2003, at A15.

6. See, e.g., *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), *aff'd* 335 F.3d 1282 (11th Cir. 2003); *Van Orden v. Perry*, __ U.S. __, 125 S. Ct. 1240 (2005).

7. See, e.g., *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003), *cert. granted in part, sub nom.*, *Elk Grove Unified School District v. Newdow*, __ U.S. __, 124 S. Ct. 2301 (2004).

On June 14, 2004, the U.S. Supreme Court held that Michael A. Nedow had no standing to sue the school district where his daughter attended elementary school to ban the words "under God" from the Pledge of Allegiance. *Elk Grove Unified School District v. Newdow*, __ U.S. __, 124 S. Ct. 2301 (2004).

Interestingly, an April 2004 Gallup Poll revealed only eight percent of the public wanted the "under God" clause removed from the Pledge—with ninety-one percent wishing to retain it. See Charles Lane, *Justices Keep 'Under God' in Pledge*, WASH. POST, June 15, 2004, at A1; see also Douglas W. Kmiec, *Oh God! Can I Say That in Public?*, 17 NOTRE DAME J. L. ETHICS & PUB. POL'Y 307; see Martin J. McMahon, Annotation, *Constitutionality of Regulation or Policy Governing Prayer, Meditation or "Moment of Silence" in Public Schools*, 110 A.L.R. FED. 211 (1992) (analyzing cases where courts have discussed or decided whether, or under what circumstances, or regulation or policy governing prayer, meditation or a moment of silence in public schools is constitutional under either federal or state constitutions).

8. See generally James Moore, *Charles Darwin*, ch. 16, and Peter J. Bowler, *Evolution*, ch. 17, in *SCIENCE AND RELIGION: A HISTORICAL INTRODUCTION* (Gary B. Ferngren ed., 2003).

role of faith and religion in health care healing,⁹ the value of affirmations of religious faith on the political hustings,¹⁰ and, internationally, the efforts of French President Jacques Chirac to ban “overt religious symbols” in public schools in France in an effort to maintain secularism throughout the educational system.¹¹

The impact that these occurrences have on the fiber of contemporary society is significant, yet, at the same time, truly incalculable. It is made more problematic because of a failure of the system to agree on a unified definition of religion.¹² This situation parallels that state which also exists in international law.¹³ Because of this present vacuum, it has been suggested that in lieu of defining religion, it would be more practicable to consider it as a belief, identity, or way of life.¹⁴ Regrettably, the law—from a national context or perspective—has not risen to the challenge and structured an unerring definition. Rather, the United States

9. Claudia Kalb, *Faith and Healing*, NEWSWEEK, Nov. 10, 2003, at 44.

10. Jim VandeHei, *A Spiritual Struggle for Democrats: Silence on Religion Could Hurt Candidates*, WASH. POST, Nov. 27, 2003, at A1. In a nonpartisan Pew Research Center study done in June, 2003, it was found that—among respondents in a poll taken—too little reference was made by politicians to religious faith and prayer. *Id.*; see also Nancy Gibbs, *The Faith Factor*, TIME, June 21, 2004, at 26; Alan Cooperman, *Religious Left Seeks Center of Political Debates: Conferees Call for Stronger Voice*, WASH. POST, June 10, 2004, at A2; Susan Page, *Church Going Closely Tied to Voting Patterns: GOP Capitalizes on Religion Gap; Democrats Debate What to Do*, USA TODAY, June 3, 2004, at A1 (discussing how the “religion gap” is shaping the new “culture war” and polarizing American politics and, further, how Republicans are counting—as a targeted voting bloc—the faithful); Julia Duin, *More Bishops Inject Faith Into Catholic Political Life*, WASH. TIMES, May 15, 2004, at A1; see generally William Carey, *American Democracy and the Politics of Faith*, in RELIGION RETURNS TO THE PUBLIC SQUARE, *supra* note 4, at ch. 5; A. JAMES REICHLEY, *FAITH IN POLITICS* (Brookings Institution 2002).

11. Keith B. Reichburg, *French President Urges Ban on [Islamic] Head Scarves in Schools*, WASH. POST, Dec. 18, 2003, at A1; Keith B. Reichburg, *French Senate Approves Ban on Religious Attire*, WASH. POST, March 4, 2004, at A14. See Robin Givhan, *The Latest Taboo in Paris*, WASH. POST, Jan 23, 2004, at C2 (reporting that the religious symbol ban has been broadened recently from “head scarves, Jewish skull caps and Christian crosses” to “include beads and bandannas”); see generally Nikki R. Keddie, *Secularism and Its Discontents*, 132 DAEDALUS 14 (2003).

12. Jeremy T. Gunn, *The Complexity of Religion and the Definition of “Religion” in International Law*, 16 HARV. HUM. RTS. J. 189, 191 (2003).

13. *Id.* at 190.

14. *Id.* at 200-05.

Supreme Court has chosen to define religion in *United States v. Seeger* by stating that “[T]he test of belief ‘in a relation to a Supreme Being’ . . . is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God”¹⁵

In August 2001, the Chief Justice of the Supreme Court of Alabama, Roy Moore, installed a two and one-half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Building—intending, as such, to remind the citizens of the state of his personal belief in the sovereignty of the Judeo-Christian God over both the state and the church. The federal district court subsequently ordered the removal of the monument, finding its placement to be in violation of the Establishment Clause of the First Amendment to the Constitution.¹⁶ On appeal, the Eleventh Circuit affirmed¹⁷ and the United States Supreme Court refused to review the case.¹⁸ While the judicial disposition of this case is now settled,¹⁹ the issue of the extent to which the acknowledgment and expression of religious faith, within the ambit of state action, is consistent with the Establishment Clause of the Constitution remains a highly vexatious matter.²⁰

An interesting parallel case concerning the placement in 1961 by the Fraternal Order of Eagles of a six-foot high granite monument etched with the Ten Commandments on the Texas state capitol grounds was held to be a proper display and not violative of the constitutional separation of church and state. In November 2003, the U.S. Court of Appeals for the Fifth Circuit ruled that the Texas state legislature, in accepting the monument, sought to honor the Eagles’ significant efforts at successfully reducing juvenile delinquency.²¹ In addition to the Commandments, the monument depicts two tablets with Hebrew text, an American flag being grasped by an eagle, two diminutive Stars of David, an eye inside a

15. *United States v. Seeger*, 380 U.S. 163, 165-66 (1965).

16. *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2003).

17. 335 F.3d 1282 (11th Cir. 2003).

18. *Moore v. Glassroth*, 540 U.S. 980 (2003) (*cert denied*).

19. Associated Press, *Alabama Judge Removed: Moore Installed Monument to Commandments*, WASH. POST, Nov. 14, 2003, at A1 (reporting on the removal of the Chief Justice from his office of the Supreme Court of Alabama by a unanimous Court of the Judiciary of Alabama).

20. See generally RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES, at ch. 11 (6th ed. 2000); Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORDHAM L. REV. 1477 (2005).

21. *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003).

pyramid and a symbol representing Christ. Also prominently displayed is an inscription acknowledging that the monument was donated by the Eagles. It is placed on land on the state capitol grounds together with sixteen other monuments honoring other Texans and historical events.

Both the federal district court²² and the federal court of appeals²³ ruled that the monument is neither to be interpreted as a personal code of conduct for youths nor construed as promotive of a sectarian religious code. Thus, the monument is neither a promotion nor endorsement by the state of any religion in contravention of the First Amendment's establishment clause. Indeed, its primary effect is to commemorate "people, ideals and events that compose Texan identity."²⁴ The appeals court acknowledged further that had the monument been installed more recently, it might well have raised a stronger inference of a religious purpose.²⁵ But, since it was installed initially in 1961, this adds force to the contention that the legislature had a secular purpose when approving its placement.²⁶

Defining the appropriate role of religion in town squares and the nation's public buildings has of late focused on the extent to which religious monuments may be placed appropriately on public land.²⁷ This

22. *Van Orden v. Perry*, 2002 U.S. Dist. LEXIS 26709 (W.D. Tex., Oct. 2, 2002).

23. *Van Orden*, 351 F.3d at 176.

24. *Id.* at 180.

25. *Id.* at 182.

26. *Id.*

27. Copeland, *supra* note 5.

Previously, the Congress had enacted the Religious Freedom Restoration Act which directed the government to demonstrate a compelling interest before intruding into any sphere of religious practice. 42 U.S.C. § 2000bb *et seq.* (1994). While the Free Exercise Clause protects absolutely religious beliefs, the state can—indeed—regulate religious conduct. In 1997, the U.S. Supreme Court, in *City of Boerne v. Flores*, held the Act was unconstitutional as a violation of the Establishment Clause. 521 U.S. 507 (1999).

Subsequently, the Congress passed The Protection of Religious Exercise in Land Use and by Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000) which requires not only that land use regulations that substantially burden religious exercise be the least restrictive means of advancing a compelling government interest, but also prohibit land use regulation either disfavoring religious uses relative to nonreligious uses or unreasonably excluding religious uses from a particular jurisdiction. 42 U.S.C. § 2000cc(b). The courts addressing the constitutionality of this Act have upheld it. DAVID L. CALLIES, ROBERT H. FREHLICH & THOMAS E. ROBERTS, *CASES AND MATERIALS ON LAND USE* 459 (4th ed. 2004); *see also* Marci A. Hamilton, *Federalism*

has become a newly energized national issue because of the pervasive concern that the distinctive moral values that underpin the founding of the Nation are eroding and thus society is becoming godless.²⁸ In addition to the Alabama²⁹ and Texas³⁰ cases, it has been reported that some two dozen disputes over the placement of monuments to the Ten Commandments or similar displays have, since 2000, been taken to the courts for settlement.³¹

Early in 1980, the United States Supreme Court recognized the Ten Commandments as a "sacred text in Jewish and Christian faiths" for which "no legislative recitation of a supposed secular purpose can blind us to that fact."³² It did not hold, however, that all government uses of the Commandments are to be taken as impermissible.³³

In 1988, the High Court, while acknowledging the subtle ways in which the values of the Establishment Clause were "not susceptible to a single verbal formulation,"³⁴ reaffirmed its 1947 decision in *Everson v. Board of Education*³⁵ which structures the framework for analyzing issues under the Establishment Clause.

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to

and the Public Good: The True Story Behind the Religious Use and Institutionalized Persons Act, 78 IND. L. J. 311 (2003).

28. Copeland, *supra* note 5. In a September, 2003, poll of 1,003 adults conducted by USA TODAY/CNN/Gallup, it was determined that seventy percent of the respondents approve of the placement of Ten Commandments monuments in public places. *Id.*

29. *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), *aff'd* 335 F.3d 1282 (11th Cir. 2003).

30. *Van Orden v. Perry*, 351 F.3d 173, 173 (5th Cir. 2003).

31. Copeland, *supra* note 5.

32. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

33. *Id.* at 42. Their use in teaching a secular study of comparative religion, history, or civilization is acceptable. *Id.* (citing *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203 (1963)).

34. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 591 (1988).

35. 330 U.S. 1 (1947).

support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.³⁶

Religious liberty and equality are, thus, guaranteed to “the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.”³⁷

The purpose of this article is to explore the conjunctive and disjunctive influences that religion has in one specific field of current sociopolitical debate; namely, biomedical technology and ethical decision making.³⁸ More specifically, the role of religion as an equal or—as the case may prove to be—limited partner with law and medical science in assessing the dimensions and patterns of application of new biotechnologies. Central to this inquiry will be a consideration of the legitimacy of, in the first instance, evolutionary science and its acceptance in public education,³⁹ for it is this science from which the whole study of genetics and eugenics arises and which in turn directs and validates the very framework for the new biomedicine.⁴⁰

From this analysis it will be seen that, far from being antagonistic to law and medicine, religion and religious principles can stabilize the field of biomedicine and serve additionally as vectors in shaping both ethical and moral constructs for decision making.⁴¹ In turn, each of these three disciplines complements and strengthens what should be the ultimate goal

36. *Id.* at 15-16 (emphasis omitted).

37. *Wallace v. Jaffee*, 472 U.S. 38, 52 (1984).

38. See generally GEORGE P. SMITH, II, *THE NEW BIOLOGY: LAW, ETHICS AND BIOTECHNOLOGY* (1989).

39. See generally R. Kent Greenawalt, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design*, 17 NOTRE DAME J. L. ETHICS & PUB. POL’Y 1433 (1999); see *Word ‘Evolution’ Troubles Georgia Schools*, USA TODAY, Feb. 2, 2004, at 6D (highlighting a recent controversy over whether the word and theory of evolution should be eliminated from the public school curricula in Georgia).

40. George P. Smith, II, *Genetics, Eugenics and Public Policy*, 1985 SO. ILL. U. L.J. 435 (1985).

41. See generally George P. Smith, II, *Intrusions of a Parvenu: Science, Religion, and The New Biology*, 3 PACE L. REV. 63 (1982).

of the state: to secure the happiness, spiritual tranquility, and well-being of its citizens. This purpose is, in turn, advanced and enhanced by safeguarding the genetic well-being and general health of its citizens.⁴² Working toward this goal will have the effect of minimizing human suffering and maximizing the social good that derives from rational and humane actions taken to displace man's genetic weaknesses from the line of inheritance.⁴³

I. SHAPING A CONSTRUCTIVE DIALOGUE

A primary goal for many religious thinkers has been to develop a process for determining how to lead science and technology toward a level of awareness and appreciation of human and environmental values.⁴⁴ Given the growing trend of placing and then testing scientific development within a framework of moral understanding and normative values, the choice is "having theologians and religious ethicists contribute a theological perspective or having scientists attempt to be moral philosophers."⁴⁵

The foundational texts of most religious communities do not address the complex issues of biotechnology and molecular biology. While the religious texts do establish broad ethical norms for purposeful living, the task becomes one of adapting a mechanism for those norms to apply to the biomedical issues of contemporary society. In other words, how to reshape and modernize them into a constructive dialogue with science—one that escapes the confines of abstract applications and offers specific guidance and modern ethical norms for resolving concrete biomedical conflicts.⁴⁶

42. George P. Smith, II, *Biotechnology and the Law: Social Responsibility or Freedom of Scientific Inquiry*, 39 MERCER L. REV. 437, 460 (1988).

43. *Id.*; George P. Smith, II, *Manipulating the Genetic Code: Jurisprudential Conundrums*, 64 GEO. L. REV. 697, 733 (1976). I am, of course, expanding the "unalienable" rights to life, liberty, and happiness set out in the Declaration of Independence to include, modernly, the right to access good genetic health since being healthy is required usually for total happiness.

44. AUDREY R. CHAPMAN, UNPRECEDENTED CHOICES: RELIGIOUS ETHICS AT THE FRONTIERS OF GENETIC SCIENCE 19 (1999).

45. *Id.*

46. *Id.*

Whether it is practical to pursue the development of a common framework for morality and ethical analysis within the context of the New Biology is problematic. Advocates of postmodernism argue that a “Christian rather than denominational approach to bioethics” is to be preferred.⁴⁷ Whatever course is followed, the challenge remains the same; namely, how to show—and thereby attempt to restate—the relevance of these religious principles to a skeptical secular society.⁴⁸

In an effort to address the basic theological and ethical issues associated with the new technologies, much study has been undertaken by various ecumenical and denominational bodies to study the ethical significance of science and technology, beginning in 1973 with the efforts of the World Council of Churches.⁴⁹ Through the succeeding years, various other studies were commissioned by organizations such as the World Conference on Faith and Science and the Future. Interestingly, their findings were never granted any official standing but merely accepted as the views of each study panel.⁵⁰ The Roman Catholic Church did, however, in 1987, begin to both clarify and shape the official dialogue for its members through the issuance of its *Instruction on Respect for Human Life in Its Origin and on the Dignity of Life*.⁵¹

All too often, a recitation of traditional beliefs was set forth without an interpretation of their implications for scientific applications.⁵² While of marginal universal significance, these faith-based denominational efforts nonetheless provide a rich opportunity for education and interaction as well as for the development of a broader-based perspective on the religious, moral, and ethical ramifications of the New Biology.⁵³ Only

47. *Id.* at 24-25.

48. *Id.* at 25.

49. CHAPMAN, *supra* note 44, at 31-32.

50. *Id.* at 32. Various reports, policy statements and studies have been commissioned by eight major North American Protestant denominations (including the Methodist, Episcopal, Lutheran, Presbyterian and Baptist churches) that address the religious and ethical ramifications of the science of genetics. *Id. passim*.

51. See generally KEVIN D. O'ROURKE & PHILIP BOYLE, *MEDICAL ETHICS: SOURCES FOR CATHOLIC TEACHING* (2d ed. 1993).

52. CHAPMAN, *supra* note 44, at 40.

53. *Id.* at 37.

54. RICHARD A. MCCORMICK, *THE CRITICAL CALLING: REFLECTIONS ON MORAL DILEMMAS SINCE VATICAN II* 267 (1989). Alterations of infrahuman life—if judged to be advantageous to a fuller human life—may be allowable under the Roman Catholic faith. Rihito Kimura, *Religious Aspects of Genetic Information*, in *HUMAN GENETIC INFORMATION: SCIENCE, LAW, AND ETHICS* 157 (CIBA Foundation 1990). See also

time will tell whether the “seeds” from these critical engagements will take root and provide normative values for biomedical decision making.

As the astonishing positive successes of genetic research, engineering, and medicine continue to be charted with clarity, the role of moral theology—grounded in various faith traditions—should be used to frame guidelines for determining if and when various applications of these technologies may be utilized within an appropriate ethical context. Father Richard A. McCormick suggested the controlling consideration should be “will this or that intervention (or omission, exception, policy, law) promote or undermine” the integrity of the human person.⁵⁴

The central concern of Father McCormick is the integrity of personhood. For him, personhood begins at conception and, accordingly, would be violated by human stem cell experimentation, cloning, and, generally, *in vitro* fertilization.⁵⁵ In this regard, McCormick is *micro*—as opposed to *macro*—in his viewpoint. Long-range or societal benefits from scientific advances of this nature and other genetic research are of secondary concern.

Drawing upon a contemporary interpretation of *tikkun olam*—or the mandate to participate in an active partnership in the repair and perfection of the world—the Jewish community supports scientific discoveries and human applications of genetic research.⁵⁶ And, interestingly for Presbyterians, “prophetic inquiry” directs that they endeavor to utilize modern technology and science in affirming the dynamic character of the creation through the teachings and interpretations of the biblical tradition.⁵⁷

Law and policy making as well as administrative and judicial decision making should not—indeed, cannot—favor one denominational theology over another. Rather, balanced decisions must be made incorporating,

GENETIC MEDICINE ENGINEERING: ETHICAL AND SOCIAL DIMENSIONS (Albert S. Moraczewski ed., 1983).

55. See Sarah Delaney, *Pope Condemns Cloning of Human Embryos*, WASH. POST, Aug. 30, 2000, at A18; see generally *infra* note 129.

Further clarification of the Vatican’s position on human cloning came in August 2003 by the President of the Pontifical Council for the Family when he stated such endeavors should be banned internationally as “crimes against the human persons” because they are against the very right to human life and true individuality. Cindy Wooden, *Human Cloning Would Be a Crime Against People*, CATHOLIC STANDARD, Aug. 14, 2003, at 3.

56. CHAPMAN, *supra* note 44, at 45.

57. *Id.* at 44-46.

when appropriate, moral and ethical (*e.g.*, religious) values with scientific objectives for individual growth and societal advancement. When cases or issues for consideration arise, they are just that: individual and fact sensitive. Nevertheless, their evaluation can be undertaken by a template shaped by a balancing of the costs versus benefits of use or nonuse—all designed to achieve a positive, just good.

No substantive resolutions are needed. Rather, the role for the various church theologies should be “interrogative.”⁵⁸ For any dialogue between science and religion to be effective, fallibilism must be an acknowledged given. In other words, both parties need to accept the proposition that they may not only be incorrect in their understandings of each other but “in their inferences about the implications of their positions, in their development of their own arguments and even in some basic claims they have never questioned.”⁵⁹

A. Love and Justice

While there are differences between a legal order, system of morality, and set of religious beliefs, it does not follow that contemporary legal order should lack elements of moral religious beliefs.⁶⁰ All laws are norms set within a hierarchy whose foundation is to be found in love, for it is within the primary form of love that justice is found.⁶¹ Indeed, Augustine saw the ethics of love as the essence of justice.⁶² For him, without the ethics of love there could be no true orderliness because nature would be disturbed by man’s willfulness.⁶³ “Without love there could be no justice for there would be lacking a cogent motive, and pattern, for men to render to other men their due . . . without love as a

58. David H. Smith, *Creation, Preservation, and All The Blessings*, 81 *ANGLICAN THEOL. REV.* 588 (2001).

59. *Id.* at 568-69; see generally IAN BARBOUR, *RELIGION IN AN AGE OF SCIENCE* (1990).

60. Samuel E. Stumpf, *Theology and Jurisprudence*, 10 *VAND. L. REV.* 885, 886 (1957).

61. Jerome Hall, *Religion, Law and Ethics—A Call for Dialogue*, 29 *HASTINGS L.J.* 1257, 1267 (1978).

62. ST. AUGUSTINE, *THE CITY OF GOD*, book xix, c.1 at 112-14 (John Healey trans., 1931). One finds happiness—or attains the peace of a rational soul (defined, in turn, as an ordered harmony of knowing and doing)—only within society itself. The happy life, then, is social and is guided by love which is seen as service and acknowledged as the universal good. Ernest Barker makes these points eloquently in his introduction to this translation at xxv-xxvii, xxxiv, xliii. See generally Raymond B. Marcin, *Justice and Love*, 33 *CATH. U. L. REV.* 363 (1984).

63. Hall, *supra* note 61, at 1270.

gift of God's grace man could not love the proper things properly."⁶⁴ In addition to including rules and concepts, law is—at its most basic level—but a set of relationships among people.⁶⁵

Despite the obvious tensions or discontinuities between law and religion, one cannot truly flourish alone. Without religion, law degenerates into little more than a mechanical legalism, and religion without law loses its social effectiveness.⁶⁶

There are four elements shared by law and religion: ritual, tradition, authority, and universality.⁶⁷ Within every religion is found two legal elements—one which relates to the social processes of the particular community sharing a faith, and the other which relates “to the social processes of the larger community of which the religious community is a part.”⁶⁸ Indeed, it has been suggested that the two major dimensions of man's social life may be seen as law and religion, even though they are dialectically interdependent vectors of force.⁶⁹

In the final analysis, perhaps it is best to see law as a way in which both justice and love are translated into complex social situations within various communities.⁷⁰ Since love is situational, it has been persuasively argued that it—rather than binding rules and *a priori* principles—should direct moral responses (micro and macro) at all levels of decision making in issues of the New Biology.⁷¹ Accordingly, the standard of humane treatment in end-of-life cases should be shaped and guided by love, just as scientific decisions regarding the suitability of investigation. In one case, the construct is personal and in the other it is communitarian.⁷²

64. *Id.*; see generally MARTIN RHONHEIMER, NATURAL LAW AND PRACTICAL REASON: A THOMIST VIEW OF MORAL AUTONOMY (Gerald Malsbary trans., 2000).

65. HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION 83 (1974).

66. *Id.* at 11.

67. *Id.* at 25.

68. *Id.* at 79.

69. HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 19 (1993).

70. *Id.* at 391.

71. See JOSEPH FLETCHER, MEDICINE AND MORALS (1954); see also George P. Smith, II, *Stop in the Name of Law!*, 19 ANGLO-AM. L. REV. 55 (1990).

72. See generally George P. Smith, II, *Setting Limits: Medical Technology and the Law*, 23 SYDNEY L. REV. 283 (2001).

II. AMERICA'S EMERGING CONSTITUTIONAL PHILOSOPHY

Ever since America was founded, the national symbol has been an eagle supported in flight and destiny by two powerful wings: plain reason or common sense and humble faith.⁷³ The founding generation drew its common sense from not only the traditional wisdom of ancient philosophers and moralists, but from the scriptures;⁷⁴ it was evidence to them that faith in the God of Abraham, Isaac, and Jacob was an ideal magnification of human reason.⁷⁵ Indeed, for the founders Judaism and Christianity served as the best unified foundation for republican institutions because they encouraged virtue and sharpened a zest for liberty.⁷⁶

From the Nation's beginning, the "dominant metaphor for church-state relations was that public officials must act as 'nursing fathers' to the religious and moral habits of the people"⁷⁷ Put simply, as a religious people, the majority of early Americans believed wholeheartedly that they owed their liberty to their creator.⁷⁸

In the United States Constitution, the action to separate church from state was driven significantly by the same recognition that religion concerns itself with differing senses or levels of reality than those of the political world.⁷⁹ Accordingly, two clauses in the First Amendment clearly enunciate the boundaries of church and state—the Establishment Clause forbids the government from making any "law respecting the establishment of religion," and the Free Exercise of Religion Clause

73. MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING 27 (2002); see also A. JAMES REICHLEY, FAITH IN POLITICS, at ch. 3 (2002).

74. MICHAEL NOVAK, *supra* note 73, at 28-29.

75. *Id.* at 30.

76. *Id.* at 30-33.

77. *Id.* at 70.

78. *Id.* at 77. While the framers valued the contribution religion made to morals, "they distrusted faith, the transcendent dimension of religion, the yearning for the divine likely to express itself in prophecy, theology, or mysticism." William Carey McWilliams, *American Democracy and the Politics of Faith*, in RELIGION RETURNS TO THE PUBLIC SQUARE, *supra* note 4, at 147.

79. FRED M. FROHOCK, HEALING POWERS 140 (1992); see generally R. Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433 (1999).

prohibits the government from restricting religious belief or practice.⁸⁰ While these two clauses, especially the second one, are taken in contemporary society as affirming rights of individual conscience and religious pluralism, strong historical evidence suggests that the framers were more interested in recognizing the establishment of religious duties free from state interference.⁸¹

One of two driving and very practical forces behind the crafting of the religion clauses in the First Amendment was an evangelical conviction that religion—and not just individual conscience—was to control a limited government that in turn must be subordinate to a sovereign God. A second fundamental conviction undergirding the separation of church and state was that the state should, quite simply, be secular and not religious. This unyielding view stood in direct opposition to the republican belief that the state should support religion in order to promote public morality. By arguing that religious integrity demanded insulation from state support, the secular view of the state triumphed in the Establishment Clause.⁸²

A. Religion's Role

The role of religion in a constitutional democracy is, surely, at the apex of current legal and social debate.⁸³ Since questions about religion involve moral issues, they are presented regularly both to the courts and to the legislatures. Furthermore, since these bodies are not “philosophically

80. FROHOCK, *supra* note 79, at 140; U.S. CONST. amend. I; *see generally* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSE AND THE AMERICAN PHILOSOPHY (J. Hunter & O. Guinness eds., 1990).

81. FROHOCK, *supra* note 79; *see generally* DAVID L. FAIGMAN, LABORATORY OF JUSTICE, at ch. 10 (2004); THOMAS CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); HERBERT HOVENKAMP, SCIENCE AND RELIGION IN AMERICA 1800-1860 (1978).

82. FROHOCK, *supra* note 79, at 140; *see Symposium, Religiously Based Morality: Its Proper Place in American Law and Public Policy*, 36 WAKE FOREST L. REV. 217, 401 (2001); *see also* John Witte Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 491-99 (1990) (presenting an excellent study of the bifurcated heritage of church-state theories and laws). Witte terms the early historical conflict as one between strict separatists and non-preferential accommodationists. *Id.* at 490-91.

83. David Novak, *Law: Religious or Secular?*, 86 VA. L. REV. 569, 570 (2000); *see* R. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); *see generally* REICHLEY, *supra* note 10; PHILIP KURKLAND, RELIGION AND THE LAW (1962); R. Kent Greenawalt, *The Use of Religious Convictions by Legislators and Judges*, 36 J. CHURCH & STATE 541 (1994).

reflective enough to deal with moral issues which are integral to debates on religious issues,”⁸⁴ difficulties in meaning, interpretation, and application are a given. Under these circumstances, it is improper to demand that the state *always* be subject to “the higher law of God.”⁸⁵ Nevertheless, it has been suggested that since the “bedrock of moral order is religion,” politics and morality can only be viewed as inseparable.⁸⁶ Interestingly, modern political activists frequently include religious believers who seek not only to shape public policy but also to seize state power.⁸⁷

If it is true that only religion provides morality with a foundation,⁸⁸ then it follows that religion may be taken as an “independent moral force”⁸⁹ in American society. The extent of its independence remains a complex and volatile issue. Some religions advance civic responsibility as a noble virtue and set high levels of moral performance in daily life, others stress a form of political withdrawal and personal passivity, and still others are obsessive and fanatical.⁹⁰

Historically, however, religion is seen as an associative force that serves to strengthen moral solidarity as well as political attachment.⁹¹ This is demonstrated by the work of various faith communities through which strong welfare organizations have been developed. These organizations draw upon high levels of popular participation in promoting multiple forms of everyday assistance.⁹²

84. Novak, *supra* note 83, at 571.

85. *But see* CHARLES E. RICE, *BEYOND ABORTION: THE THEORY AND PRACTICE OF THE SECULAR STATE* 135 (1979).

86. Ronald Reagan, *Politics and Morality Are Inseparable*, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y 7 (1984); *see generally* James Carroll, *Why Religion Still Matters*, 132 DAEDALUS 9 (2003).

87. Michael Walzer, *Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619 (1999); *see generally* KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

88. Walzer, *supra* note 87, at 623.

89. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 9 (1993).

90. Walzer, *supra* note 87, at 624.

91. *Id.* at 630.

92. *Id.*

B. Political Underpinnings

Religions, and the moral theologies attendant to them, have a decidedly political character.⁹³ Indeed, Judaism, Christianity, and Islam are regarded in the main as political. While being prophetic, they have nevertheless sought, and continue to seek, to challenge the socio-political status quo and attack the economic inequalities of society. Religions also endeavor to protect the sick and unhealthy and to be a voice for the abused and other marginalized interest groups.⁹⁴

When ecumenical political dialogue is engaged, it is a significant and positive undertaking because it provides a forum where citizens and members of faith communities can seek consensus to diminish dissension or simply to clarify issues of common disagreement. Through this dialogue, participants are always able to "cultivate the bonds of political community by reaffirming their ties to one another, in particular their shared commitment to certain authoritative politico-moral premises."⁹⁵

Often characterized as a Christian nation, America still advocates a discursive type of religious pluralism.⁹⁶ Allowing, indeed tolerating, an open debate on religion itself becomes the immediate goal. When religion does not inform the debate, however, but rather undergirds it, the central concern is the extent to which "belief or nonbelief in a God makes the difference in one's normative stance."⁹⁷

A distinct feature of modernity is the notion that law is totally secular, without a founding God, and thus independent of any divine command other than the force of human reason⁹⁸ which is, of necessity, directed toward the establishment of intelligible order.⁹⁹ A contrary view suggests that "everyone must invoke some God or other because . . . everyone has to speak normatively," for participation in any public activity calls for an acknowledgment of the need for law.¹⁰⁰

No doubt, the central question to be posited today is: In a constitutional democracy defining itself as a secular polity, can religion

93. MICHAEL L. PERRY, LOVE AND POWER: THE ROLE OF RELIGION IN AMERICAN POLITICS 77 (1991); *see also* CHAPMAN, *supra* note 44, at 17.

94. PERRY, *supra* note 93, at 78.

95. *Id.* at 124-25.

96. Novak, *supra* note 83, at 575-76.

97. *Id.* at 576.

98. *Id.* at 576-77.

99. *Id.* at 579-80; *see also* JOHN W. GOUGH, THE SOCIAL CONTRACT: A CRITICAL STUDY OF ITS DEVELOPMENT (2d ed. 1957).

100. Novak, *supra* note 83, at 593.

101. *Id.* at 572.

ever be represented as the basis of the rule of law?¹⁰¹ Can the law's secular legitimacy be derived from religious principles, values, moral teachings or practices apart from validating a specific historical religion?¹⁰² Finally, does moral adherence to a body of law require belief in a God?¹⁰³ Throughout most of recorded human history, there has always been a connection between God and the law.¹⁰⁴ For example, the all-inclusive name the Bible uses for God is *elohim*, which means "authority"—first, divine; secondarily, human.¹⁰⁵

Whatever the template for contemporary analysis is tied—a convenantal theology of the Bible, Platonic natural law, Hobbesian natural law, or a philosophically informed morality seen in the English common law—"the majority of [American] citizens believe themselves obligated by a prior, divine morality, despite the fact that most of them are unable to argue for it theoretically."¹⁰⁶ It is for the philosophers and moral theologians to make these arguments.¹⁰⁷

III. EVOLUTION AND CHRISTIAN THOUGHT

Charles Darwin's *Origin of the Species* first appeared in 1859 and advanced a theory of organic evolution, arguing current living species evolved from preexisting ones. Chevalier de Lamarck, a French naturalist, advanced a theory of progressive evolutionary development derived from "vital forces within living things and the inheritance of acquired characteristics" more than a century earlier.¹⁰⁸ Rather than accept Lamarck's theory that the process of natural selection was driven by a benign process of individual adaptation, Darwin postulated a "survival of the fittest" process in evolutionary development. Indeed, the central feature of Darwinism became the concept of natural selection.¹⁰⁹

The ultimate challenge from Darwinism to the Christian world was the notion that "[b]eneficial variation was random and natural selection

102. *Id.*

103. *Id.* at 573; see generally Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 CAL. L. REV. 427 (1997).

104. Novak, *supra* note 83, at 574.

105. *Id.* at 575.

106. *Id.* at 595-96.

107. *Id.* at 596; see RONALD DWORKIN, *LAW'S EMPIRE* 407 (1986).

108. EDWARD J. LARSON, *SUMMER FOR THE GODS* 14 (1997).

109. *Id.* at 16. The theory of evolution focuses on changes in life once begun rather than the origins of life.

cruel. If nature reflected the character of its creator, then the God of a Darwinian world acted randomly and cruelly.”¹¹⁰ The Darwinian theory of a mindless process of natural selection suggests a universe not only blind to life and humanity but totally indifferent to its operation.¹¹¹ Yet within this theory was found the elements of what is termed “evolution theodicy.” This, in turn, gave rise to a movement that advocated the acceptance of God’s aloofness or separation from natural evil. Thus this movement stood outside a strictly scientific framework of analysis and was instead wed to metaphysical presuppositions about the nature of God.¹¹²

Interestingly, while philosophy and science have always been influenced by theology—and especially so with evolutionary theory—evolutionists steadfastly deny the influence.¹¹³ Yet, as observed, a central metaphysical presupposition infuses the whole of evolutionary science: namely, that evolution’s success is tied to a doctrine of God. In other words, “It is a theological view that preceded evolution historically and became the metaphysical landscape on which the theory was constructed.”¹¹⁴ Today, one of the leading authorities in the field has suggested that the process of evolution should be seen within an historical context which, in turn, serves as an enhanced guide to understanding nature.¹¹⁵

It is thought that evolutionary information comes from two central sources: the science of genetics and contemporary culture.¹¹⁶ From this comes the view that religion is to be seen “as an information system within culture that is part of the effort of nature to understand itself and conduct itself in freedom.”¹¹⁷

The interrelatedness of all creation is shown time and again by scientific work in genetics. Indeed, the new DNA discoveries restate with

110. *Id.* at 17; *see generally* MICHAEL R. ROSE, *DARWIN’S SPECTRE: EVOLUTIONARY BIOLOGY IN THE MODERN WORLD*, at chs. 7-11 (1998).

111. CHAPMAN, *supra* note 44, at 169.

112. CORNELIUS G. HUNTER, *DARWIN’S GOD* 145, 159 (2001).

113. *Id.* at 160.

114. *Id.* at 159; *see generally* JOHN F. HAUGHT, *DEEPER THAN DARWIN: THE PROSPECT FOR RELIGION IN THE AGE OF EVOLUTION* (2003).

115. STEPHEN JAY GOULD, *THE STRUCTURE OF EVOLUTIONARY THEORY*, at chs. 2-7 (2002); *see generally* JAMES B. CONANT, *ON UNDERSTANDING SCIENCE: AN HISTORICAL APPROACH* (1947).

116. CHAPMAN, *supra* note 44, at 172 (citing PHILIP HEFNER, *THE HUMAN FACTORY: EVOLUTION, CULTURE, AND RELIGION* 37 (1993)).

117. *Id.* at 173 (citing HEFNER, *supra* note 116, at 156).

convincing clarity the shared evolutionary heritage of all living things¹¹⁸ and the constant lifetime interaction between genes and the environment.¹¹⁹ The cultural and physical environment interacts with the biological sciences as a coefficient, or at least a vector of force, in influencing the total development of the individual. Because individuals, as cultural beings, shape the contexts in which social interactions occur, they exhibit an inherent capacity for ethical behavior and spiritual development.¹²⁰ Indeed, the mystery of the human spirit and the capacity for self-transcendence will never be eliminated by the New Biology.¹²¹

While genetic science sheds considerable light on human nature, it does not explain it totally. The complexity, transcendence, and mystery of the human person remain and thus serve as a reference point of intersection between culture and theology as well as the natural sciences.¹²² A positive force in contemporary society can be seen in the ongoing dialogue between genetics, molecular biology, and the theology of human nature which seeks to build upon these very points.¹²³ When a distinctly religious voice in, for example, medical ethics becomes passive or is lost, this in turn encourages a form of moral philosophy for the market place and thus places law as the dominant source of morality.¹²⁴ Hopefully, this intercultural discourse will create new frameworks for principled decision making which, in turn, can promote reasoned and balanced ethical responses to personal and societal challenges of this age of the New Biology.¹²⁵

A. A Papal Clarification

On October 23, 1996, in an address by John Paul II to the Pontifical Academy of Science, the Holy Father suggested that science and religion are compatible. "Science can purify religion from error and superstition; religion can purify science from idolatry and false absolutes. Each can

118. CHAPMAN, *supra* note 44, at 175.

119. *Id.* at 178.

120. *Id.*

121. *Id.*

122. *Id.*

123. See JAMES S. GUSTAFSON, INTERSECTIONS: SCIENCE, THEOLOGY, AND ETHICS (1996); CHAPMAN, *supra* note 44, at 199-204.

124. CHAPMAN, *supra* note 44, at 15 (relying upon the philosophy of Daniel Callahan).

125. See generally ROGER L. SHINN, THE NEW GENETICS: CHALLENGES FOR SCIENCE, FAITH, AND POLITICS (1996).

draw the other into a wider world, a world in which both can flourish.”¹²⁶ As to the specific issue of the theory of evolution, the Pope acknowledged that it is “more than just a hypothesis.”¹²⁷ While not mentioning Charles Darwin by name, this statement nonetheless advances the idea that religious faith and the teaching of evolution can coexist.¹²⁸ Indeed, while noting that there are a number of different theories of evolution, the Holy Father observed, “It is possible to accept evolution as a theory while affirming that the spiritual and philosophical elements must remain outside the competence of science.”¹²⁹ At least within Roman Catholic theology, what had been the most significant point of argument and division between the genetic revolution and theology as a body of thought¹³⁰ was resolved.

Today, a consensus has been reached not only among scientists and biblical scholars, but mainstream religions and educators as well—that the theory of evolution is a verifiable account of the origins of life.¹³¹ The Pope’s acceptance of evolution as a theory suggests that “[s]cience is not a threat to faith.”¹³² Accordingly, John Paul II has charted a middle position between the creationists and evolutionists that, in turn, fosters not only dialogue but openness to truth.¹³³

B. Darwinism and Intelligent Design

In 1991, Philip E. Johnson constructed the philosophical underpinnings of the contemporary Intelligent Design movement that, in essence,

126. BERNARD J. FICARA, *EVOLUTION: FACT, FICTION, OR FANCY*, at ch. 21 (2001).

127. John Tagliabue, *Pope Bolsters Church: Support for Scientific View of Evolution*, N.Y. TIMES, Oct. 25, 1996, at A1; see JOHN PAUL II, *ON SCIENCE AND RELIGION* (Robert J. Russell et al. eds., 1990).

128. Tagliabue, *supra* note 127, at A12.

129. FICARA, *supra* note 126, at 124; see also MICHAEL RUSE, *THE RELATIONSHIP BETWEEN SCIENCE AND RELIGION* (2001); JOHN PAUL II, *supra* note 127.

130. CHAPMAN, *supra* note 44, at 235.

131. JOHN A. MOORE, *FROM GENESIS TO GENETICS* 190-191 (2002).

132. Edmund D. Pellegrino, *Theology and Evolution in Dialogue*, 79 Q. REV. BIOLOGY 385, 389 (1997).

133. *Id.* at 389.

asserts the theory of Darwinian evolution is based on inaccurate assumptions and weak evidence.¹³⁴ More specifically, the small but vocal number of biologists, chemists, philosophers, and mathematicians who constitute the membership of the movement argue that because mainstream science considers only natural explanations for things, it is biased against proofs of supernatural intervention in the evolutionary process. Thus, the efficacy of the evidence for evolution through natural processes is called into question.¹³⁵

Proponents of the theory of intelligent design believe simply that an intelligent agent (but not necessarily using the word “God”) has guided the history of the earth.¹³⁶ Criticized as not being a science, the president of the National Academy of Science has termed Intelligent Design as nothing more than a “way of restating creationism in a different formulation.”¹³⁷

The vast majority of the scientific community believes that evolution began billions of years ago and was both unsupervised and impersonal. Yet, others find significant gaps in the scientific record that leave evolution more a theory than a documented fact. These individuals contend that the evolution of the species took place over time by the

134. PHILLIP E. JOHNSON, *DARWIN ON TRIAL* (1991).

135. See INTELLIGENT DESIGN CREATIONISM AND ITS CRITICS: PHILOSOPHICAL, THEOLOGICAL, AND SCIENTIFIC PERSPECTIVES (Robert T. Pennock ed., 2001). Claiming, originally, that the word — evolution — was too narrow a word and theory in the science curriculum in the Georgia state schools and should, therefore, be broadened to include “intelligent design” and replaced with the phrase, “biological changes over time,” the state superintendent of schools bowed to negative public opinion and rescinded her original plans to effect this change. Ellen Barry, *The Nation: Schools Chief's Viewpoint Evolves*, L.A. TIMES, Feb. 6, 2004, at A12; see generally Greenawalt, *supra* note 39; see also Peter Slevin, *Battle on Teaching Evolution Sharpens*, WASH. POST, Mar. 14, 2005, at A1 (discussing the trend developing in nineteen states to teach the principles of Intelligent Design as a supplement to the Darwinian theory of evolution).

136. BRIAN J. ALTERS & SANDRA M. ALTERS, *DEFENDING EVOLUTION IN THE CLASSROOM: A GUIDE TO THE CREATION/EVOLUTION CONTROVERSY* (2001); see Edward B. Davis & Robin Collins, *Scientific Naturalism*, in *SCIENCE AND RELIGION: A HISTORICAL INTRODUCTION*, *supra* note 8, at 322 (analyzing the advocates of Intelligent Design attacks on scientific naturalism or the claims that “all objects, processes, truths, and facts about nature fall within the scope of the scientific method”).

137. Beth McMurtrie, *Darwinism Under Attack*, CHRON. HIGHER ED., Dec. 21, 2001, at A8; see generally Francis Beckewith, *Science and Religion Twenty Years After McLean v. Arkansas: Evolution, Public Education, and The New Challenge of Intelligent Design*, 26 HARV. J.L. & PUB. POL'Y 455 (2003).

grand design of a transcendent personal creator. These creationists also contend that the true age of the earth, as inferred from the Bible, should be computed in thousands rather than billions of years.¹³⁸

The Genesis Flood, published in 1965, introduced the term “creation science” into the American vocabulary, launching the Creation Science movement.¹³⁹ Soon thereafter, a whole movement took shape.¹⁴⁰ Followers of the Creation Science movement, termed creationists, adopt the biblical narrative of Genesis as their theory of origin,¹⁴¹ accepting as such the creation of the world by a personal God.¹⁴² For the creationists, only two possible constructs can be employed to resolve the question of the origin of life and of the universe: theistic and atheistic. In other words, God is acknowledged as the creator of history or life and seen as an evolutionary dynamic.¹⁴³

The book of Genesis has not been accepted as a teaching source in public school classrooms, nor has Creation Science succeeded in reshaping mainstream science. Indeed, led by the National Academy of Science, mainstream scientific organizations have totally rejected the creationist approach.¹⁴⁴

Central to the claims of the legitimacy of creationism is an apparent conundrum: if creationists accept the Bible as true and infallible, then

138. See generally INTELLIGENT DESIGN CREATION AND ITS CRITICS, *supra* note 135.

139. JOHN C. WHITCOMB & HENRY M. MORRIS, *THE GENESIS FLOOD* (1965); see also DOROTHY NELKIN, *THE CREATION CONTROVERSY: SCIENCE OR SCRIPTURE IN THE SCHOOLS* (1982).

140. Judith Villarreal, *God and Darwin in the Classroom*, 64 CHI.-KENT L. REV. 335, 345 (1988).

141. See generally ARLIE HOOVER, *THE CASE FOR TEACHING CREATION* (1981).

142. Villarreal, *supra* note 140, at 350.

143. *Id.* at 351; see also HUGH ROSS, *THE GENESIS QUESTION: SCIENTIFIC ADVANCES AND THE ACCURACY OF GENESIS*, at ch. 11 (1998); see also RONALD COLE-TURNER, *THE NEW GENESIS: THEOLOGY AND THE GENETIC REVOLUTION* (1993); Bill Broadway, *Redefining Omniscience: Theologians Who Contend That God Doesn't Know the Future Face Fervent Criticism—and Expulsion from Evangelical Group*, WASH. POST, Nov. 8, 2003, at B9 (reporting on how the theory of open theism constitutes, for some, an egregious departure from orthodoxy and as such requires those who advance it be excluded from membership in the Evangelical Theological Society).

144. STEVEN GOLDBERG, *SEDUCED BY SCIENCE* 33 (1999).

145. *Id.* at 35-36

146. *Id.* at 36.

why is it important to link it with science? The answer given is that since creationism does not afford a set of hypotheses capable of being tested, a higher level of legitimacy is sought by making science its *modus operandi*.¹⁴⁵ This desire for increased legitimacy arises from the idea that “[m]odern Americans cling to scientific rhetoric no matter what the issue.”¹⁴⁶ Indeed, “scientific sanctification” validates many conservative beliefs by attributing scientific credibility to their biblical interpretations.¹⁴⁷ What is seen in reality, then, is that by shifting attention from issues of faith and value to those of scientific interpretation, the scientific creationists have “reduced the Bible to the level of a science [text].”¹⁴⁸

Since mainstream Christians and Jews do not see the Bible and evolutionary theory as inconsistent, modern Creation Science is not a contemporary issue of great moment.¹⁴⁹ Rather, they understand that science itself can neither tackle and resolve the moral issues of the day nor serve as a template for living life to the fullest. Put simply, “[W]hether rejected or accepted, evolution cannot speak to the vital issue of right and wrong.”¹⁵⁰

C. Scopes and Its Aftermath

In 1925 in Dayton, Tennessee, a high school science teacher, John T. Scopes, taught a class on evolutionary theory, triggering a national debate over the origins of mankind. This debate forced the nation to confront not only its fears and suspicions of scientific knowledge, but its application and uses as well.¹⁵¹ In essence, the “Scopes Monkey Trial” pitted religion and a fundamentalist view of divine creation (e.g., creationism) against scientific thought on evolution. It also became a harbinger of the utilization of evolutionary biology that began after World War II.¹⁵² William Jennings Bryan represented the fundamentalist cause and argued for a strict, literalist approach to interpreting the Bible. Clarence Darrow, as opposing counsel, was more interested in promoting

147. *Id.* at 37.

148. *Id.* at 25; see also RONALD L. NUMBERS, *THE CREATIONISTS* (1992).

149. GOLDBERG, *supra* note 144, at 38-39.

150. *Id.* at 39; see RAYMOND A. EVE & FRANCIS B. HARROLD, *THE CREATIONIST MOVEMENT IN MODERN AMERICA* (1991); see generally FICARA, *supra* note 126, at ch. 18.

151. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (Tenn. 1927).

152. Gilbert Merritt, *From the Scopes Trial to the Human Genome Project: Where is Biology Taking the Law?*, 67 U. CIN. L. REV. 365, 368 (1999).

secularism than individual freedom.¹⁵³ Bryan worried that the public school teaching of Darwinism, with its emphasis on the argument that humans were products of a random, survival-of-the-fittest evolutionary process, would fuel "militarism, imperialism, the exploitation of labor and eugenics."¹⁵⁴

In 1925, Tennessee became the first state in the nation to enact a law against the teaching of evolution in the public schools. Not only was Darwinism prohibited, but all teaching concerned with human evolution was banned as well. Criminal sanctions were imposed for violations. The ACLU responded that the statute violated the First Amendment, prompting Bryan and Darrow to elevate their legal arguments to issues of high drama and emotion: religion and morality. In the end, Scopes was found guilty by a jury and the court imposed a fine of one hundred dollars. On appeal, the Supreme Court of Tennessee went back to the original legal issue, whether the anti-evolution statute was inconsistent with the state constitution's religion clause, which forbade preferences being given by law to either religious establishment or pattern of worship. With a single dissent, the court held that the challenged legislation was constitutional. Yet, on a technicality, Scopes's conviction was reversed on appeal. Since under the Tennessee Constitution any fine greater than fifty dollars could be assessed only by a jury, it was held that the trial judge had no jurisdiction to impose the one hundred dollar fine.¹⁵⁵

The historians of the 1950s and the commentators of the 1930s saw the *Scopes* trial at two levels: both groups agreed that it was a defeat for fundamentalism, while the commentators saw it as a "media spectacular."¹⁵⁶

In the end, then, perhaps the *Scopes* trial can be viewed properly as "a step in the triumph of reason over revelation and science over superstition."¹⁵⁷ Stated otherwise, the enduring importance of *Scopes* is that it embodied the quintessential "American struggle between individual liberty and majoritarian democracy, and cast it in the timeless debate over science and religion."¹⁵⁸ The *Scopes* controversy continues to

153. Edward J. Larson, *The Scopes Trial and the Evolving Concept of Freedom*, 85 VA. L. REV. 503, 519 (1999).

154. *Id.* at 508; see generally FAIGMAN, *supra* note 81, at ch. 6.

155. Larson, *supra* note 153, at 512.

156. LARSON, *supra* note 108, at 239. See generally EDWARD A. WHITE, *SCIENCE AND RELIGION IN AMERICAN THOUGHT: THE IMPACT OF NATURALISM* (1952).

157. LARSON, *supra* note 108, at 227.

158. *Id.* at 265; see generally JOHN H. BROOKE, *SCIENCE AND RELIGION: SOME HISTORICAL PERSPECTIVES* (1991).

persist even today,¹⁵⁹ recast now as Creation Science (as opposed to creationism) versus evolution.¹⁶⁰

D. *The Continuing Debate: Strategizing Against Evolution*

It was not until 1968, and the case of *Epperson v. Arkansas*,¹⁶¹ that the federal constitutionality of prohibiting the teaching of evolution in public schools was decided by the United States Supreme Court. Here, again, the ACLU joined in seeking a declaratory judgment against a forty year old anti-evolution statute which had never been used. With but one dissent, the Court held the statute void because it sought to establish a religion and thus violated the Establishment Clause.¹⁶² "Religious purpose alone became the Court's basis for striking the law."¹⁶³ Stated simply, it was held that there could be no state prohibition against teaching a scientific theory or doctrine for reasons that would counter the fundamental principles of the First Amendment.

In 1987, in the case of *Edwards v. Aguillard*, the United States Supreme Court held that a creationism law in Louisiana forbidding the teaching of the theory of evolution in public elementary and secondary schools, unless accompanied by instruction in the theory of Creation Science, was facially invalid as violative of the Establishment Clause of the First Amendment.¹⁶⁴ The purpose of the challenged legislation was to discredit evolution by counter balancing its teachings at every turn with the teaching of creationism—a purpose which would promote the beliefs of certain religious groups.¹⁶⁵

159. See, e.g., Jon Christensen, *Teachers Fight for Darwin's Place in U.S. Classrooms*, N.Y. TIMES, Nov. 24, 1998, at F3.

160. Villarreal, *supra* note 140, at 345.

161. 393 U.S. 97 (1968).

162. Larson, *supra* note 153, at 524.

163. *Id.* at 525.

164. 482 U.S. 578 (1987).

165. For an analysis of whether Creation Science is really science or merely the religious doctrine of divine creation repackaged in jargon, together with arguments for creationism from the Establishment Clause and the Free Exercise Clause of the Constitution, see Dan Scheid, *Evolution and Creationism in the Public Schools*, 9 J. CONTEMP. L. 81, 100 (1983), and CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT, at ch. 5 (2004); FAIGMAN, *supra* note 81, at 318-23; see generally Jay D. Wexler, *Darwin, Design, and Disestablishment Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751 (2003); see also BERT THOMPSON, THE SCIENTIFIC CASE FOR CREATION (1985).

With the ultimate demise of the anti-evolution statutes through *Epperson*, opponents of evolution have two, possibly three, strategies in their present battle to eviscerate or bury the theory. First-line attacks have centered on supporting attempts to exclude evolution from being taught in the classrooms altogether—asserting as such that the teaching of evolutionary theory promotes the religion of secular humanism.¹⁶⁶ Accordingly, its inclusion in public school science curricula violates the Establishment Clause of the Constitution. Courts have rejected this view generally—holding that the theory of evolution is scientific and not to be taken as a religious belief.¹⁶⁷

The second strategy has focused on efforts to either compel the teaching of creationism as another valid scientific theory of the origins of life or, alternatively, to discredit the importance of the theory of evolution in the sciences. This strategy has been advanced by efforts at the state level to legislate balanced treatment acts designed to require public schools to give balanced treatment to Creation Science with evolution science.¹⁶⁸ This approach has also been unsuccessful.¹⁶⁹

Another clever approach—and no doubt the third strategy—to advancing the Creation Science movement, has been seen more recently in 1999 with the actions of the Kansas State School Board in adopting a new statewide science curriculum which wipes out virtually all mention of evolution as well as related concepts such as natural selection, common ancestors, and the origins of the universe.¹⁷⁰ While the science standards did not prohibit the teaching of creationism, they clearly discouraged the teaching of evolution. Even though these standards were but guidelines,

166. Wendell Bird, Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L. J. 515 (1978).

167. Colleen McGrath, *Redefining Science to Accommodate Religious Beliefs*, 45 N.Y.L. SCH. L. REV. 297, 303 (2001).

168. *Id.* at 303; see also ARK. CODE ANN. § 80-1663 (1981); 17 LA. REV. STAT. ANN. § 286 (1981); TENN. CODE ANN. § 49-2008 (1973).

169. McGrath, *supra* note 167, at 305-09; see also *McLean v. Arkansas*, 529 F. Supp. 1255 (E.D. Ark. 1982), often referred to as *Scopes II*, where state legislation mandating balanced treatment of Creation Science and evolution science in public school curricula was held unconstitutional thus thereby dealing a death blow to the teaching of creationism and, by implied reference, the teaching of Intelligent Design. Beckewith, *supra* note 137, at 458.

170. Hanna Rosin, *Creationism Evolves: Kansas Board Targets Darwin*, WASH. POST, Aug. 8, 1999, at A1. But see Larry Witham, *49 States Mandate Teaching Evolution*, WASH. TIMES, April 8, 2000, at A3 (reporting, however, that Louisiana, Mississippi, Georgia, Alabama, Florida and Arkansas have very brief and restricted standards in regards to the teaching of evolution).

allowing each school board within the state the freedom to decide whether to continue to teach evolution, the State School Board had the final authority to determine the content of standardized tests. Accordingly, it was decided—beginning with the 2000-2001 school year, that both the seventh and tenth grade state science examinations would not contain questions regarding the origin of life, the earth, and the universe. The practical effect of this decision is that the teaching of evolution in the classroom is now discouraged at best and—at worst—eliminated totally.¹⁷¹

In November 2000, a new state board of education was elected in Kansas. It proceeded to reject the 1999 science standards and went on to adopt new standards which identified evolution as one of the unifying concepts of science.¹⁷² These standards direct students who have completed the twelfth grade to acquire an understanding of biological evolution and the origin and evolution of the earth and the universe. The statewide science examination will, furthermore, contain specific questions on evolution.¹⁷³ Automatically, every four years, the science standards will be reviewed.¹⁷⁴ School board elections are conducted within that time frame as well. It will be interesting to observe whether history will repeat itself and the creationists try again to do administratively what they have found difficult to achieve legislatively and judicially: namely, to delete the theory of evolution from the public school curriculum.¹⁷⁵ Interestingly, while seen as a volatile subject of considerable debate, the Catholic school system teaches both the science of evolution together with the belief that the human soul is the result of divine design.¹⁷⁶

One overriding point remains clear: since the Supreme Court failed to address clearly in *Edwards v. Aguillard* the multiple relationships and interactions of religion, science, and secular humanism within the bounds of public school education, unending controversy will continue.¹⁷⁷ Indeed, all of the Supreme Court's decisions since the Tennessee Supreme Court's decision in *Scopes v. State* have failed to slow the spread of creationism. Rather, they have encouraged fundamentalists, more and

171. McGrath, *supra* note 167, at 319.

172. *Id.* at 328.

173. *Id.*

174. *Id.* at 329.

175. See, e.g., NELKIN, *supra* note 139.

176. Peter Applebome, *Pope Shows How Faith and Evolution Coexist*, N.Y. TIMES, Oct. 25, 1996, at A12.

177. Villarreal, *supra* note 140, at 374.

more, to abandon evolution—teaching public education for creation-affirming church affiliations or home schooling where their faith, and that of their children, can be nurtured and sustained.¹⁷⁸

E. New Outreaches and Challenges

Even with the “failures” of public education to accommodate fundamentalism in curricular offerings, a most interesting occurrence is being recorded: that is, religion — as an academic subject — is no longer confined to divinity schools and Sunday pulpits. Today, it is probed, and its relevance examined, in undergraduate and graduate programs in sociology, political science, international relations, business, and medicine.¹⁷⁹ Rather surprisingly, this newfound student interest in the field of religion and the quest to make its tenets applicable to the contemporary problems of daily professional living is reshaping the content and the direction of the whole of the social sciences.¹⁸⁰ However, the extent to which explicit religious arguments should be introduced into public debate remains an open-ended issue.¹⁸¹

178. See generally Larson, *supra* note 153 (discussing the *Scopes* trial and its effect on perception of religious liberty from a narrative history perspective).

The Religious Land Use and Institutionalized Persons Act of 2000 forbids the government from imposing or implementing a land use regulation that imposes a substantial burden on the religious exercise of a person or religious assembly; this protection also extends to schools run by religious groups. 42 U.S.C. § 2000cc (a)(1); see generally Caroline Adams, *The Constitutional Validity of The Religious Persons Act of 2000*, 70 *FORDHAM L. REV.* 2361 (2002); see also R. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 *COLUM. L. REV.* 1843 (1998).

179. Teresa Watanabe, *Faith's Social Reach: Academia Is Getting Religion*, *WASH. POST*, Nov. 9, 2000, at L8; see Lauren Bryant, *Minding the Divine*, 64 *IND. ALUMNI MAG.* 32 (July/Aug. 2002); see also HAROLD G. KOENIG ET AL., *HANDBOOK OF RELIGION AND HEALTH*, at 58-59, 437-39 and 455-56 (2001) (for the impact of religion/spiritual education within medical schools).

180. Watanabe, *supra* note 179.

181. GOLDBERG, *supra* note 144, at 130. See also Mark V. Tushnet, *The Limits of the Involvement of Religion in the Body Politic*, in *THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY*, at ch. 7 (James E. Wood, Jr. & Derek Davis eds., 1991); Karin Brulliard, *In Texas, a Darwinian Debate: Religious Student Protests Professor's Question on Evolution*, *WASH. POST*, Feb. 16, 2003, at A7 (detailing a student of creationism at Texas Tech University's challenge to a biology professors right to restrict his issuance of student recommendations for medical school to those who first affirm a belief in human evolution—his contention being that because of his belief in

In 2002, Ohio became the latest battleground for the introduction of the Intelligent Design theory into the state school science curriculum. Drawing upon the language of a congressional conference report¹⁸² on a major federal education law enacted earlier in the year,¹⁸³ Representatives John A. Boehner and Steve Chabot of Ohio urged the Ohio Board of Education to adapt the science curriculum in the state to consider, in addition to teaching biological evolution, the full range of scientific views that exist. Opponents of this effort view it as nothing more than a wider campaign to mandate the teaching of Intelligent Design theory into the nation's science classrooms.¹⁸⁴

Citing a 2001 Zogby opinion poll that found seventy-one percent of those surveyed supported the idea of offering students "the scientific evidence against evolution," the two congressmen argued that excluding this other evidence would be nothing less than "a censorship of opposing points of view."¹⁸⁵ Further support for the lawmakers' proposition was offered in a proposed amendment to an amendment by Senator Rick Santorum to extend the Elementary and Secondary Education Act of 1965. The amendment passed June 13, 2001, on a 91 to 8 vote,¹⁸⁶ but—while being considered "a sense of the Senate"—never succeeded in

creationism he was ineligible for recommendation and was thus a victim of religious discrimination).

182. H.R. CONF. REP. NO. 107-334 (2001), *reprinted in* 2001 U.S.C.C.A.N. 1230.

183. No Child Left Behind Act of 2001, 20 U.S.C.A. § 6053 *et seq.* (2002).

184. Michael Fletcher, *Teaching Alternative to Evolution Backed*, WASH. POST, May 29, 2002, at A3. See Valerie Strauss, *Fresh Challenges in the Old Debate over Evolution*, WASH. POST, December 7, 2004, at A14 (reporting on the efforts of proponents of teaching Intelligent Design to have it taught in the science education curriculum through the nation and particularly in Cobb County, Georgia).

185. *Id.* Interestingly, in a *Time/CNN* poll taken in 2002, it was found that thirty-six percent of Americans believe, literally, that the Bible is the word of God and must be followed. Amanda Bower et al., *Apocalypse Now*, TIME, July 1, 2002, at 44-45.

186. 147 Cong. Rec. S6147, 6148, 6153 (June 13, 2001) (statement of Sen. Santorum). The two sentences in the Santorum amendment state:

It is the sense of the Senate that (1) good science education should prepare students to distinguish the data or testable theories of science from philosophical or religious claims that are made in the name of science; and (2) where biological evolution is taught, the curriculum should help students to understand why this subject generates so much continuing controversy, and should prepare the students to be informed participants in public discussion regarding the subject. *Id.*

becoming a part of an ultimate revision of the Act itself that was passed in January 2002 as the No Child Left Behind Act of 2001.¹⁸⁷

IV. INTERPRETING, RECONCILING, OR STABILIZING

In a May 1959 Rede Lecture at The University of Cambridge, C. P. Snow articulated his thesis that contemporary (post-war) society was composed of two competing and often clashing cultures: the (literary) intellectuals and the scientists.¹⁸⁸ Since science was not a subject presented easily to the public through literature (*e.g.*, journals and magazines) the self-proclaimed intellectuals ignore the value and importance of the ideas and values science sought to promote. Thus, the scientific ethic remained largely invisible as an intellectual, moving activity.¹⁸⁹

In the second edition of *The Two Cultures* published in 1963, Snow suggests the emergence of a new third culture which will close the communications gap between the literary intellectuals and the scientists and will, further, be recognized in the future as new public intellectuals or synthesizers. As such, they will be interpreters of the ideas and values of the continuing scientific revolution.¹⁹⁰

Today, Snow's third culture has undergone a radical transformation, for literary intellectuals no longer communicate at any sustained level with scientists; rather, scientists communicate directly with the general public. In the past, the traditional intellectual media played what has

187. The House-Senate Conference Committee passed in January, 2002, H.B. 1 (extending the Elementary and Secondary Education Act) without the Santorum amendment on the teaching of Intelligent Design theory. While the joint conference report includes the Santorum amendment, *supra* note 186, and serves as a rich source of legislative history the actual legislation, does not include this amendment. See *supra* note 183.

188. C. P. SNOW, *THE TWO CULTURES AND THE SCIENTIFIC REVOLUTION* (1959). See generally Stephen P. Weldon, *Postmodernism*, in *SCIENCE AND RELIGION*, *supra* note 8, at 371-86.

189. SNOW, *supra* note 188. But see Avery Dulles, *Science and Theology*, in JOHN PAUL II ON SCIENCE AND RELIGION, *supra* note 129, at 9-10 (observing that the Pope disputes Snow's idea of a world divided into two cultures — humanistic and scientific — and instead urges interaction between religion and science; holding further that without this symbiotic relationship science becomes destructive and religion sterile).

190. C. P. SNOW, *THE TWO CULTURES: AND A SECOND LOOK* (1963). See Carl Sagan, *Describing the World As It Is, Not As It Would Be*, in *THE WRITING LIFE: WRITERS ON HOW THEY THINK AND WORK* 309-11 (Marie Arana ed., 2003) (arguing for a concerted national effort to write clearly about science and popularize it through books so that every citizen can, in turn, understand it).

been termed “a vertical game”—with journalists writing up and professors writing down.¹⁹¹ In contemporary society, “third-culture thinkers tend to avoid the middleman and endeavor to express their deepest thoughts in a manner accessible to the intelligent reading public.”¹⁹² Indeed, what in the past was seen as “science” is now “public culture,”¹⁹³ for science *is* the news.¹⁹⁴ Yet, having the capacity to synthesize scientific knowledge remains an enormous problem for the average citizen.¹⁹⁵

Borrowing from Snow’s ideas, perhaps religion could serve as a stabilizer or interpretative “third culture” between law and medical science. Others would no doubt see this idea as but an aspirational goal, arguing that religion is a destabilizing force since most of the tenets of main-line religious faiths are, as observed, still rooted in and tied to historical biblical precedents which lack a contemporary focus for application. A democratic and political process tied more to television sound bites than intelligent and informed deliberations among its citizens is a process guaranteeing itself lethargic inactivity if not stagnation. It is for the judiciary to fill the breach and continue its role as interpreters of the common law and when need be, architects of the new age of biotechnology. Ideally, when individual cases of profound disagreement arise over issues of medical science, courts and legislatures should remain passive and allow resolution of these disputes within each concerned family unit and, where possible, their church or community of faith.¹⁹⁶ The at-risk family and its religious support groups, however, are unable to cope with understanding the ramifications of ultimate decisions regarding medicine. “[M]ediating structures”¹⁹⁷ can only go so far in discerning and promoting legal justice—or the obligation to support the common good.¹⁹⁸ The common good is shaped by the legislatures and the courts and—ultimately—remains for an enlightened judiciary to interpret

191. JOHN BROCKMAN, *THE THIRD CULTURE* 18 (1995).

192. *Id.*

193. *Id.*

194. *Id.*; Sagan, *supra* note 190, at 311.

195. BROCKMAN, *supra* note 191, at 28.

196. DOUGLAS W. KMIEC, *CEASE-FIRE ON THE FAMILY AND THE END OF THE CULTURE WAR* 55 (1995).

197. PETER L. BERGER & RICHARD J. NEUHAS, *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 148-49 (1996). See generally GEORGE P. SMITH, II, *FAMILY VALUES AND THE NEW SOCIETY: DILEMMAS OF THE 21ST CENTURY* (1998); see also George P. Smith, II, *Monograph*, *CHALLENGING FAMILY VALUES IN THE NEW SOCIETY* 18 (1996).

198. KMIEC, *supra* note 196, at 97.

its course. It is regrettable, but a fact in contemporary society, that every complex moral issue is more often than not transformed into a legal issue.¹⁹⁹ Since law and morality intersect in daily life, it is not surprising that the courts are called upon to arbitrate.²⁰⁰ Invariably, law supports some visions of how life should be lived within the community while, at the same time, undermining others.²⁰¹

V. A SYNERGISTIC PARTNERSHIP

Religion and its denominational theologies set normative standards for ethical conduct and thus serve as a construct for social decision making. Alternatively, as suggested, these norms and constructs can be seen properly as a third culture—interpreting, reconciling, and stabilizing law and medical science. Yet, if the view is accepted that the “bedrock of moral order is religion,”²⁰² it must follow that law and science not only build upon it but are linked irretrievably to it in all of their present policies and actions.

The alternative hypothesis suggests the synergistic forces of law, religion, and science combine in a dynamic partnership to form a communitarian alliance dedicated to providing a framework in which man can pursue the peace of ordered harmony that allows for a balanced happiness in his social, spiritual, and physical relationships.²⁰³ Within the alliance, the rank or equality of status of these forces depends largely upon the frame of reference taken for each problem presented. Historically, there can be no disputation of the first-order significance of the moral and ethical theories and principles derived from religion. Indeed, it has been suggested that without religious beliefs, moral teachings merely “hang in the air” without any foundation.²⁰⁴ In contemporary society, however, law—as has been suggested—must assume the primary role of directing and stabilizing all courses of human

199. M. Cathleen Kaveny, *Law, Morality and Common Ground*, AMERICA, December 9, 2000, at 7. Indeed, Justice Antonin Scalia terms the fixation Americans have with the law as a “material obsession.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (1997).

200. *Id.* See generally Greenawalt, *supra* note 83.

201. Kaveny, *supra* note 199, at 8.

202. Reagan, *supra* note 86. See generally R. Kent Greenawalt, *The Role of Religion in a Liberal Democracy: Dilemmas and Possible Solutions*, 35 J. CHURCH & STATE 503 (1993).

203. See ST. AUGUSTINE, *supra* note 62.

204. PETER SINGER, *WRITINGS ON AN ETHICAL LIFE*, at xviii (2000).

affairs—fortified in interpretative analysis, to be sure, by ethical and moral principles. In public matters, however, if not a Jeffersonian “wall of separation” between matters of church and state, then at least a Madisonian “scrupulous neutrality” must be maintained if faithfulness to the original intent of the framers of the Constitution is to be respected.²⁰⁵

While Americans believe in “the living Constitution” as a “morphing document” evolving from age to age according to majority wishes²⁰⁶—expressed and manifested ideally, as such, through a “deliberative” democratic process²⁰⁷ (sadly, not guided by informed judgment)—the central weakness to this theory of living constitutionalism is that there is no one guiding principle for it to follow.²⁰⁸ In contemporary issues of biomedicine, there is little rational deliberation by the populace. This condition, in turn, forces the judiciary—as interpreters of the laws and the social conscience—to define and inevitably test current medico-legal issues by the text and legislative history of the Constitution thereby providing, ideally, both predictability and stability to both an evolving and highly contentious area of the law.²⁰⁹

A. *Compatibilities and Incompatibilities*

The duality of man, or the recognition of his spiritual and material sides, has not been the grounds upon which contemporary science has advanced. Rather than challenge and attack this concept, science has merely set it aside and defined as nonscientific all inquiries into spiritual matters.²¹⁰ As the scientific dialogue has assumed increasingly that man is no more than matter and energy, dualism has nearly disappeared.²¹¹ Yet, throughout modern science there remains a continuing search for an intersection point between values and empiricism.²¹²

205. See Witte, Jr., *supra* note 82; see generally GOLDBERG, *supra* note 144, at ch. 8; GREENAWALT, *supra* note 87. But see Jacqueline Salmon, *Scalia Defends Public Expression of Faith*, WASH. POST, Jan. 13, 2003, at B1 (reporting on Justice Scalia's concerns that too many court decisions have, in recent years, outlawed expressions of religious faith in public events).

206. SCALIA, *supra* note 199, at 46-47.

207. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION*, at chs. 4-6 (1993).

208. SCALIA, *supra* note 199, at 44-45.

209. See *id.* at 44. See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (2000).

210. GOLDBERG, *supra* note 144, at 18.

211. *Id.*

212. *Id.* at 135. See generally GUSTAFSON, *supra* note 123.

Perhaps the noblest and most practical point of balance between religion and science should be love, justice, or humaneness—for its achievement by humanity promotes the essence of faith by instilling meaning and value to the life experience and also enhances one's overall physical well-being. Stated otherwise, the fulcrum of this balancing test between religion and science is the achievement of a point of equilibrium that promotes policies and shapes direct actions that minimize suffering and improve the social well-being of all humanity.²¹³

There is a common misperception that religion needs only faith in order to sustain itself. The correct understanding is that "religion requires belief and belief is built on knowledge."²¹⁴ Within differing contexts, both science and theology, then, seek truth and wise judgment.²¹⁵

B. Toward Reconciliation

Not every scientist must become a believer nor must every believer totally embrace science in order for there to be a reconciliation between science and faith. While viewed from vastly different perspectives, the biblical and the scientific description of the creation of the universe and the beginning of life on earth present identical realities. Once these perspectives are identified, they can coexist rather comfortably. If an acceptance of the need to read and understand the Bible on the Bible's terms—complete with subtextual levels of interpretation—is understood and science then admits it is powerless to either confirm or deny a purpose for life, a true reconciliation between science and faith will be achieved.²¹⁶

Scientific investigation is in fact very similar to religious experience. In science, the defining event is when that which was unknown becomes visible. In spirituality, experiences with meaning, purpose, and teleology are foundational. Thus, semantic differences remain small between

213. Smith, *supra* note 72. See also *supra* notes 61, 62 and accompanying text.

214. GERALD SCHROEDER, *THE SCIENCE OF GOD: THE CONVERGENCE OF SCIENTIFIC AND BIBLICAL WISDOM* 18 (1997).

215. JOHN POLKINGHORNE, *BELIEF IN GOD IN AN AGE OF SCIENCE* 92 (1998).

216. SCHROEDER, *supra* note 214, at 21. Science has already sought to close biblical ranks by recognizing there was not only a beginning to the universe but that life began on earth rapidly following water and not through millennia of random sets of reactions. *Id.* at 29. See also ARTHUR PEACOCKE, *PATHS FROM SCIENCE TOWARDS GOD: THE END OF ALL OUR EXPLORING*, at chs. 1-2 (2001).

scientific insight and what is termed—in the language of religion—revelation.²¹⁷

CONCLUSION

A Unified Goal and Response

The theologies of the world's religions not only demand an answer but also prompt a response to the problem of suffering—for they assist in seeking an explanation to, or rationalization of, suffering. In one very real sense, then, the New Biology is considered properly as a theological response to the enigma of human suffering. The medical scientists and physicians endeavor to cure. Through therapeutics and investigation, the purpose of religion and medical science is the same: to minimize or ameliorate suffering.²¹⁸ It remains ultimately for law to serve as a primary mechanism for effecting this duality of purpose through wise and humane legislation, administrative policy making, and judicial interpretations designed to assume both distributive and corrective justice²¹⁹ in the delivery of health care and the advancement of medical science²¹⁹ which, in turn, promote the personal dignity, value, and integrity of the human person.²²⁰

217. See SCHROEDER, *supra* note 214; ARTHUR PEACOCKE, *THEOLOGY FOR A SCIENTIFIC AGE: BEING AND BECOMING – NATURAL, DIVINE, AND HUMAN* (1993).

218. See *HEALTH/MEDICINE AND THE FAITH TRADITIONS: AN INQUIRY INTO RELIGION AND MEDICINE* 209 (Martin E. Marty & Kenneth L. Vaux eds., 1982). Interestingly, eighty-four percent of Americans think that praying for the sick improves their chances of recovery. Kalb, *supra* note 9, at 46.

219. George P. Smith, II, *Distributive Justice and Health Care*, 18 J. CONTEMP. HEALTH L. & POL'Y 421 (2002). See generally GEORGE P. SMITH, II, *GENETICS, ETHICS, AND THE LAW* 164-65 (1981).

220. J. ROBERT NELSON, *ON THE NEW FRONTIERS OF GENETICS AND RELIGION* 162 (1994). See generally JOSÉ I. LAVASTIDA, *HEALTH CARE AND THE COMMON GOOD: A CATHOLIC THEORY OF JUSTICE* (2000).